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No. 93-1305

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

383 MADISON ASSOCIATES,

Petitioner,

- against -

CITY OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

RESPONDENTS' BRIEF IN OPPOSITION

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1. Whether the determination of the Appellate Division rests on an independent and adequate state ground, thus depriving this Court of jurisdiction to review that Court's order?

2. Whether the Courts below correctly determined that plaintiff's takings claim is meritless?

3. Whether the Courts below correctly determined that plaintiff's substantive due process claim is meritless?

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RESPONDENTS' BRIEF IN OPPOSITION

JURISDICTION

Plaintiff, 383 Madison Associates (petitioner herein), incorrectly invokes the jurisdiction of this Court under 28 U.S.C. § 1257(3). As more fully reviewed herein, the decision of the New York Supreme Court, Appellate Division, First Department, is based on an independent and adequate state ground, *i.e.*, that the administrative determination denying plaintiff's application for a special permit was rationally based.

Plaintiff's purported constitutional claims were summarily rejected by the New York Courts. The *nisi prius* Court found them to be "baseless and without merit" (20a).[1] The Appellate Division determined that there are no constitutional issues involved (see, 3a-4a).

The absence of a constitutional basis for the determinations of the New York Courts is confirmed by the orders of the New York Court of Appeals. Plaintiff appealed as of right to the Court of Appeals from the Appellate Division order, alleging, as required by statute, that "there is directly involved the construction of the constitution of the ... United States." New York Civil Practice Law and Rules ("NYCPLR") § 5601(b)(1). "[T]he constitutional question must be a substantial one." H. Cohen and A. Karger, *Powers of the New York Court of Appeals* § 55, at 252 (reprint ed. 1992); *see* Thomas R. Newman, *New York Appellate Practice* § 11.02[3][b].

Upon its *sua sponte* determination of "whether it has subject matter jurisdiction and authority to review" (22[B] New York Code of Rules and Regulations § 500.3), the Court of Appeals dismissed plaintiff's appeal "upon the ground that no substantial constitutional question is directly involved" (47a). Thereafter, the Court denied plaintiff's motion, made pursuant to NYCPLR, section 5602(a)(1)(i), for leave to appeal, upon which motion plaintiff raised the same constitutional questions which it again presents on its certiorari petition (see, 48a).

The New York Courts correctly determined that the denial of plaintiff's application for a special permit does not implicate any questions with constitutional dimensions. Since the determination of the Appellate Division thus rests

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[1] Parenthetical references appearing as "__a" are to pages of the appendix to the petition for a writ of certiorari.

on an independent and adequate state ground, the petition for a writ of certiorari should be denied on the basis of this Court's lack of jurisdiction.

STATEMENT OF THE CASE

A. History

Plaintiff is a limited partnership which owns the parcel of land located at 383-385 Madison Avenue in the New York City borough of Manhattan (R. 13-14, 16).[2] This land is presently occupied by a 13 story office building which is vacant as a result of plaintiff's refusal to renew leases (R. 144, 655-56, 868).

The genesis of this action dates back to plaintiff's decision to utilize the site to construct a 74 story, 1,029 foot high office tower, the fourth tallest building in New York City (R. 655-56, 1724). The proposed tower exceeds by more than two times the as-of-right bulk limitations of the Zoning Resolution of the City of New York ("ZR") for the midtown district in which the site is located (R. 656-57).

Plaintiff seeks to accomplish its goal by utilizing certain transferable development rights ("TDRs") which it has contracted to purchase from The New York and Harlem Railroad Company ("Harlem") (see, R. 15). Harlem is the owner of Grand Central Terminal and the Manhattan property on which it is located (R. 1850). In 1967, the Terminal was designated a landmark (R. 656), a designation which was ultimately sustained by this Court. *See Penn Central Transportation Co. v. New York City*, 438 U.S. 104

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[2] Numbers in parentheses preceded by "R." refer to pages of the record on appeal filed in the New York Supreme Court, Appellate Division, First Department.

(1978) ("*Penn Central*"). The unused development rights above the landmarked Terminal were converted into TDRs upon the enactment of section 74-79 of the Zoning Resolution (see, R. 679-80).

Section 74-79 permits the transfer of unused development rights from lots occupied by a landmark to adjacent lots, as that term is defined in the section. The transfer of TDRs off of a sending lot to a receiving lot permits the development of the latter lot beyond the limitations otherwise imposed by the Zoning Resolution (see, R. 656-57). Pursuant to section 74-79, the transfer must be authorized by a special permit granted by defendant New York City Planning Commission ("CPC"). Section 74-792 of the Zoning Resolution sets forth the findings which CPC must make "[a]s a condition of permitting such transfer."

Contending that its lot is one of the potential receiving lots of Terminal TDRs, plaintiff, jointly with Harlem, filed an application for a special permit with CPC (R. 661; see, R. 690-726). The applicants sought permission to transfer approximately 800,000 square feet of TDRs from the Terminal lot to 383-385 Madison Avenue (R. 15-16). The grant of such a permit would enable plaintiff to construct the proposed office tower.

Upon its consideration of the record developed during the statutorily prescribed review of the application, CPC determined that it could not approve the project (35a). In an extensive report, which reviewed the factual and legal history of the application (see, 21a-46a), CPC provided four reasoned bases, each sufficient by itself to defeat the application, for its determination.

CPC determined, first, that the transfer of TDRs to plaintiff's property is not legally possible because the property is not an eligible receiving lot. That is, it is not,

as required by the Zoning Resolution, adjacent to the landmark lot (see, 36a-37a, 44a). CPC concluded that such ineligibility aside, the special permit should otherwise be denied on the basis of the "excessive bulk and density" of the proposed tower (38a; see, 38a-41a). The project's "adverse environmental impacts," CPC also found, were not "sufficiently minimize[d] or avoid[ed]," and "the potential mitigative measures that have been identified are only capable of mitigating a portion of the disclosed adverse impacts" (45a; see, 41a). Finally, CPC concluded that it was not able to make the required finding that plaintiff's application included "a program that will result in the preservation of the landmark" (43a; see, 41a-43a).

B. Proceedings below

In plaintiff's judicial challenge to CPC's determination, the *nisi prius* Court granted defendants' motion for summary judgment dismissing the complaint, finding that the record demonstrated, "in exhaustive and meticulous detail," that "CPC had valid reasons for not issuing the special permit to [plaintiff]" (13a). The Court concluded that CPC's determination "was rational on four separate grounds each of which would have been sufficient reason in itself for denying the permit" (*id.*; see, 13a-20a). With regard to the constitutional issues upon which plaintiff purports to rest its certiorari petition, the Court succinctly noted that they had been "reviewed and found baseless and without merit" (20a).

On plaintiff's appeal to the New York Supreme Court, Appellate Division, First Department, that Court disagreed with the lower Court only to the extent of determining that some of CPC's findings could not be sustained (see, 3a). Since, however, the Appellate Division determined that the findings of the absence of adjacency and excessive bulk were rationally based, it affirmed the denial of the special permit (see, 1a-3a). The Court further found

that plaintiff's constitutional claims were singularly without merit. "[S]ince plaintiff did not have a property right to the grant of a special permit," the Court said, "[its] constitutional claims must be rejected" (3a-4a).

Purportedly pursuant to NYCPLR, section 5601(b)(1), plaintiff filed a notice of appeal as of right to the New York Court of Appeals. However, upon a finding that "no substantial constitutional question is directly involved," that Court dismissed the appeal (47a). Thereafter, pursuant to NYCPLR, section 5602(a)(1)(i), plaintiff moved for leave to appeal to the Court of Appeals, raising the same constitutional issues which it again raises on its certiorari petition. The Court of Appeals denied the motion (see, 48a).

REASONS FOR DENYING THE WRIT

A. The determination of the Appellate Division rests on the independent and adequate state ground that there is a rational basis for the administrative determination denying plaintiff's application for a special permit. This Court, therefore, lacks jurisdiction to review the order of the Appellate Division.

The New York Courts correctly perceived this action to be in the nature of a proceeding pursuant to article 78 of the NYCPLR to review the administrative determination denying plaintiff's special permit application. In this regard, the regulatory scheme of the Zoning Resolution could not be more clear. The transfer of development rights from lots occupied by a landmark may be accomplished only pursuant to a special permit issued by CPC. The grant of such a permit "shall be in accordance with all the regulations set forth" in the relevant sections of the Resolution. ZR § 74-79. Under such circumstances, New York decisional law sets forth, in unmistakable terms, the scope of judicial review of administrative determinations

regarding special permits. Plaintiff's obfuscation and misdirection do not alter the essential nature of its challenge to CPC's denial of its special permit application.

We begin with applicable black-letter law. "Board action refusing to grant a 'special exception' is by definition and in essential character discretionary and not a denial of a right[.]" *Matter of Lemir Realty Corp. v. Larkin*, 11 N.Y.2d 20, 24, 226 N.Y.S.2d 374, 376, 181 N.E.2d 407, 408 (1962) ("*Lemir*"); *accord Matter of Tandem Holding Corp. v. Board of Zoning Appeals*, 43 N.Y.2d 801, 802, 402 N.Y.S.2d 388, 389, 373 N.E.2d 282, 283 (1977) ("*Tandem*") ("Entitlement to a special exception is not a matter of right[.]").

The availability of a special permit (or, exception [*see* 3 Ziegler, *Rathkopf's The Law of Zoning and Planning* § 41.01(4th ed.)]) is conditioned upon the standards in the zoning ordinance which guide the administrative body's consideration of special permit applications, "and compliance with those standards must be shown before any exception can be secured." *Tandem, supra,* 43 N.Y.2d at 802, 402 N.Y.S.2d at 389, 373 N.E.2d at 283; *accord Matter of Cicenia v. Zoning Board of Appeals*, 157 A.D.2d 722, 725, 549 N.Y.S.2d 818, 820 (2d Dept. 1990) ("[S]pecial permits can only be issued by a zoning board upon fulfillment of the conditions mandated in the applicable zoning code.").

The New York courts "do not sit to supervise the discretionary acts of the hundreds of town boards and town zoning boards in this State." *Lemir, supra,* 11 N.Y.2d at 24, 226 N.Y.S.2d at 376, 181 N.E.2d at 409. The zoning authority "must act reasonably," and, if it does so, "the courts may not interfere." *Id.*, 11 N.Y.2d at 26, 226 N.Y.S.2d at 378, 181 N.E.2d at 409-10. Upon "review 'as to reasonableness in an article 78 proceeding'" (*id.*, 11 N.Y.2d at 24, 226 N.Y.S.2d at 376, 181 N.E.2d at 409),

the action of a zoning authority denying a special permit will be sustained if the determination has a "rational basis" in the record (*Brick Hill Construction Corp. v. Zoning Board of Appeals*, 53 N.Y.2d 621, 623, 438 N.Y.S.2d 776, 776, 420 N.E.2d 968, 968 [1981]) and is "neither arbitrary nor capricious." *Matter of EBA Realty Co. v. Galante*, 156 A.D.2d 448, 450, 548 N.Y.S.2d 737, 739 (2d Dept. 1989); *see Tandem, supra,* 43 N.Y.2d at 801-02, 402 N.Y.S.2d at 389, 373 N.E.2d at 283 ("The determination of the board, that petitioner's application did not nor could not ... meet the standards in the ordinance governing the granting of special exceptions, is sufficiently supported in the record.").

In the instant case, CPC's decision to deny plaintiff's special permit application was premised on four separate and independent grounds, each one of which was alone sufficient to support the denial . The *nisi prius* Court determined that all of the reasons assigned by CPC for denying the application were reasonably based. While the Appellate Division found some of those reasons to be inadequate, it nonetheless sustained the denial of the special permit on the ground that other reasons given were rational. *See Matter of Wegmans Enterprises, Inc. v. Lansing,* 72 N.Y.2d 1000, 1001-02, 534 N.Y.S.2d 372, 373, 530 N.E.2d 1292, 1293 (1988) ("Failure to meet any one of the conditions set forth in the ordinance is ... a sufficient basis upon which the zoning authority may deny the permit application[.]").

The Appellate Division properly analyzed the propriety of CPC's action in terms of the rationality of its determination to deny plaintiff's application for a special permit. Since that Court unequivocally rested its determination on an independent and adequate state ground, rejecting plaintiff's suggestion that its challenge to the permit denial has constitutional dimensions, this Court lacks jurisdiction to review the order of the Appellate Division.

B. The Courts below correctly determined that plaintiff's takings claim is meritless.

Even assuming the correctness of plaintiff's conclusory, "cornerstone" statement that it has a property interest in the Terminal TDRs (see, Petition, at 10-13),[3] plaintiff's takings claim, as the Courts below correctly determined, is, nonetheless, without merit. "Ownership" of the TDRs places plaintiff in no different position than any property owner who seeks to utilize the property in a manner which a local zoning ordinance allows only by special permit. As recognized by the Courts below, and as herein demonstrated, plaintiff's challenge is thus to the administrative determination to deny its application for a special permit.[4]

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[3] The contract of sale evidences plaintiff's knowledge of the fact that the Zoning Resolution allows the transfer and use of TDRs only by special permit. As noted by the *nisi prius* Court (see, 17a), the contract explicitly provides that plaintiff may terminate the contract if it is unable to obtain the required special permit (see, R. 296-99). Significantly, Harlem, although it joined in the special permit application, did not join in this challenge to the denial of the permit.

[4] We do not understand plaintiff to be mounting a constitutional challenge to the decision to make utilization of TDRs contingent upon the receipt of a special permit. Such a challenge would, in any event, fail. The use of special permits is a well established technique to control development. *See* 3 Ziegler, *Rathkopf's The Law of Zoning and Planning* § 41.01, at 41-2 (4th ed.) ("The special permit or exception zoning technique has a long history in the land use regulatory process in this country.").

As we herein demonstrate, the remaining questions, *i.e.*, whether the conditions imposed are reasonably related to rational planning goals and whether the determination that the conditions have not been met is reasonable, are questions of state law only.

(continued...)

With respect to its elaborately argued takings claim (which was relegated in the complaint to the third cause of action [see, R. 34-35]), plaintiff does not cite a single case in which the mere denial of a special permit was held to be a taking of private property for public use within the meaning of the Fifth or Fourteenth Amendment. There are no such cases. The government cannot take property if it does not, in the first instance, exist. By definition, a special permit, assuming the stated conditions have been met, allows a property owner to develop private property in a manner in which the applicable zoning ordinance otherwise prohibits. It permits, rather than proscribes, a particular utilization of property. Plaintiff, in short, does not have a "right" to the special permit in question (*see Tandem, supra,* 43 N.Y.2d at 802, 402 N.Y.S.2d at 389, 373 N.E.2d at 283 ["Entitlement to a special exception is not a matter of right[.]"]), and its "unilateral expectation" is not an interest in property which is subject to being "taken."

Plaintiff's reliance on *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), is misplaced. The inapplicability of *Nollan* to the facts of the instant case is so patently obvious that the Courts below were able, quite correctly, summarily to reject plaintiff's constitutional claims. In *Nollan*, this Court's constitutional analysis was prompted by California's effort to exact an easement over private property for the benefit of the public as a condition for issuing a land-use permit. Quite simply, the

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4 (...continued)
Plaintiff's attempt to demonstrate how the Zoning Resolution permit conditions in the instant case constitute a taking (see, Petition, at 13-20) leads to the absurd result of leaving all individual local permit conditions throughout the country, countless in number, vulnerable to constitutional attack. This Court's decisions do not require the courts to engage in such an exercise.

government sought to transfer the use of property from the private to the public domain. This Court analyzed this uncompensated transfer in order to determine whether it violated the Fourteenth Amendment.

The clear implication of *Nollan*, which plaintiff refuses to acknowledge, is that an analysis such as that engaged in by this Court is not appropriate without such a transfer. As herein demonstrated, the denial of a special permit does not effect a transfer of private property. The Courts below thus correctly determined that there is nothing herein upon which to predicate a constitutional violation.[5]

Moreover, plaintiff's takings claim is not now, and never will be, ripe for adjudication. One who advances a regulatory takings claim "must establish that the regulation has in substance 'taken' his property - that is, that the regulation 'goes too far.'" *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986) ("*MacDonald*"). In order to determine whether a regulation has gone "too far," a court must know "how far the regulation goes." *Id.* Because of the nature of special permits, the denial of a permit will never go "too far" so as to constitute a taking.

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[5] As noted, a special permit allows a property owner to develop property in a manner otherwise prohibited by a zoning ordinance. It turns takings theory on its head to analyze the government "giving" something in terms reserved for when the government "takes" something.

In this regard, the discussions of special permits in two recognized treatises do not include any references to *Nollan*. *See* 2 Anderson, *New York Zoning Law and Practice*, chap. 24 (3d ed. [August 1993 cum. supp.]); 3 Ziegler, *Rathkopf's The Law of Zoning and Planning*, chap. 41 (4th ed.).

In the instant case, CPC's denial of plaintiff's special permit application for the particular tower in question patently does not foreclose the development of plaintiff's property. Most apparently is this true by virtue of the fact that an as-of-right building occupies the site. Although it is presently vacant solely as a result of business decisions made by plaintiff, the record is barren of evidence that plaintiff cannot earn a reasonable return by utilizing this existing as-of-right building.

Precisely this issue was involved in *Penn Central*, *supra*, 438 U.S. 104, wherein this Court rejected the argument that the landmarking of the Terminal "is of such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain [it].'" 438 U.S. at 136. This Court specifically noted that the landmark designation "not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years." *Id.* As a result, this Court concluded, "the law does not interfere with what must be regarded as [appellants'] primary expectation concerning the use of the parcel." *Id.*

Similarly, in the instant case, the discretionary denial of the special permit does not deprive plaintiff of its ability to realize its "primary expectation" to utilize its property in conformity with the Zoning Resolution.[6] *See*

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[6] The analysis in *Penn Central*, in conjunction with the nature of a special permit and the absence of a property interest in its being granted, disposes of any argument that plaintiff has a reasonable investment backed expectation of using the Terminal TDRs at its site. As the text makes clear, plaintiff could reasonably expect, its "primary expectation" in the words of this Court, only to develop its property in conformity with the Zoning Resolution. Its unilateral hope to utilize the Terminal TDRs by obtaining the required special permit can mature into a reasonable

(continued...)

The Rector, Wardens and Members v. City of New York, 914 F.2d 348, 357 (CA2 1990), *cert. denied*, 499 U.S. 905 (1991) (The Court held that the denial of the right to demolish a landmarked building did not, under all of the circumstances, constitute a taking. The "palpable" deprivation of commercial value was not a taking, the Court held, "so long as continued use [of the landmarked structure] is viable."); *Shubert Organization, Inc. v. Landmarks Preservation Commission*, 166 A.D.2d 115, 122, 570 N.Y.S.2d 504, 508 (1st Dept.), *appeal dism'd*, 78 N.Y.2d 1006, 575 N.Y.S.2d 456, 580 N.E.2d 1059, *leave to appeal denied*, 79 N.Y.2d 751, 579 N.Y.S.2d 651, 587 N.E.2d 289 (1991), *cert. denied*, __ U.S. __, 112 S.Ct. 2289, 119 L.Ed.2d 213 (1992) (Rejecting a takings challenge to the landmarking of theatres in New York City, the Court noted, *inter alia*, that "there is no prohibition against petitioners receiving economic benefit from continuing the use of the buildings as theatres.").

Even aside from the question of plaintiff's ability to utilize the site for as-of-right development, plaintiff has not sought permission for any type of modified development utilizing Terminal TDRs. All that has occurred is that plaintiff has been denied a special permit to construct a 74 story office tower. CPC's "rejection of a single development plan is not sufficient to demonstrate that a regulatory takings claim is ripe for decision" (*Sudarsky v. City of New York*, 779 F. Supp. 287, 300 [SDNY 1991], *aff'd*, 969 F.2d 1041 [CA2 1992], *cert. denied*. __ U.S. __, 113 S.Ct. 1059, 122 L.Ed.2d 365 [1993]), because such does not constitute a "final definitive position regarding how

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6 (...continued)
expectation only if plaintiff can satisfy all of the requirements of the Resolution for obtaining the permit. As the Appellate Division correctly determined. CPC rationally concluded that at least some of the required findings could not be made.

[CPC] will apply the regulations at issue to the particular land in question.'" *MacDonald, supra*, 477 U.S. at 351.

That is, since there has been no "conclusive determination as to what development would be allowed on [the] property" (*Sudarsky v. City of New York, supra*, 779 F.Supp. at 300), plaintiff's takings claim is premature. As was true of the appellant in *MacDonald*, plaintiff has been denied the right to utilize its property for only "one intense type" (*MacDonald, supra*, 477 U.S. at 342n.8) of commercial development. There is nothing in the record which indicates that CPC would not be inclined to permit plaintiff to utilize TDRs for a less "intense" development of the property. "Rejection of exceedingly grandiose plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." *MacDonald, id.*, 477 U.S. at 353n.9.

Plaintiff's failure to submit an application for a building of less bulk and with fewer environmental impacts, or to seek a variance pursuant to section 72-21 of the Zoning Resolution, precludes it from now asserting a takings claim. *See Penn Central, supra*, 438 U.S. at 136-37 ("While the Commission's actions in denying applications to construct an office building in excess of 50 stories above the Terminal may indicate that it will refuse to issue a certificate of appropriateness for any comparably sized structure, nothing the Commission has said or done suggests an intention to prohibit *any* construction above the Terminal.... Since appellants have not sought approval for the construction of a smaller structure, we do not know that appellants will be denied any use of any portion of the airspace above the Terminal" [emphasis in original].); *Sudarsky v. City of New York, supra*, 779 F. Supp. at 300-01; *Matter of Parkview Associates v. City of New York*, 71 N.Y.2d 274, 283, 525 N.Y.S.2d 176, 179, 519 N.E.2d 1372, 1375, *appeal dism'd and cert. denied*, 488 U.S. 801 (1988) ("... Parkview's claim that the City's action

constitutes a taking without due process of law or just compensation may not be addressed in this action and at this time because Parkview had failed to apply for a variance[.]"); *Shubert Organization, Inc. v. Landmarks Preservation Commission, supra*, 166 A.D.2d at 122, 570 N.Y.S.2d at 508.

C. The Courts below correctly determined that plaintiff's substantive due process claim is meritless.

"In order to state a substantive due process claim, a party must first establish that he had a valid 'property interest' in a benefit that was entitled to constitutional protection at the time he was deprived of that benefit." *Sudarsky v. City of New York, supra*, 779 F. Supp. at 294; *accord Coyne v. City of Somerville*, 972 F.2d 440, 403 (CA1 1992). "'Property interests flow not from the Constitution itself, but from "existing rules or understandings that stem from an independent source such as state law."'" *Weissman v. Fruchtman*, 765 F. Supp. 1185, 1190 (SDNY 1991), *citing Board of Regents v. Roth*, 408 U.S. 564 (1972).

In the context of a due process claim involving the failure to issue a special permit, "an entitlement analysis [is utilized] to determine whether a party's interest in the permit's issuance is protectible under the Fourteenth Amendment." *Sudarsky v. City of New York, supra*, 779 F. Supp. at 294. Upon such an analysis, "the proper inquiry is 'whether, absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the [permit] application would have been granted.'" *Natale v. Town v. Ridgefield*, 927 F.2d 101, 105 (CA2 1991).

Application of that test "must focus on the degree of discretion enjoyed by the issuing authority" to grant or deny the permit in question. *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 918 (CA2), *cert.*

denied, 493 U.S. 893 (1989); *see Dean Tarry Corporation v. Friedlander* 826 F.2d 210 (CA2 1987); *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54 (CA2 1985). Given this focus, "the question of whether an applicant has a property interest will normally be a matter of law for the court." *RRI Realty Corp. v. Incorporated Village of Southampton*, supra, 870 F.2d at 918.

The Courts below correctly concluded that plaintiff's substantive due process claim is meritless. Under applicable New York law, the special permit sought by plaintiff is not a property interest which is entitled to constitutional protection. As fully reviewed herein, the decision whether to grant a special permit is a quintessential discretionary act. In reviewing the evidence in order to determine whether an applicant has met the conditions for granting a special permit, a zoning authority applies its "discretion and commonsense judgments." *Matter of Market Square Properties, Ltd. v. Town of Guilderland Zoning Board of Appeals*, 66 N.Y.2d 893, 895, 498 N.Y.S.2d 772, 772, 489 N.E.2d 741, 741 (1985). As noted, "[b]oard action refusing to grant 'a special exception' is by definition and in essential character discretionary and not a denial of a right[.]" *Lemir, supra*, 11 N.Y.2d at 24, 226 N.Y.S2d at 376, 181 N.E.2d at 408.

In the instant case, CPC had wide discretion to consider plaintiff's special permit application in light of the findings which it is required to make pursuant to sections 74-79 and 74-792(5) of the Zoning Resolution. "This wide discretion prevented [plaintiff's] expectation of success from rising to the level of a property right meriting protection under the ... Fourteenth Amendment[]." *Dean Tarry Corporation v. Friedlander, supra*, 210 F.2d at 213. Plaintiff's substantive due process claim thus "amounts to an attempt to manufacture an entitlement from a unilateral expectancy that [its] project could be approved." *Sudarsky v. City of New York, supra*, 779 F. Supp. at 297; *see*

Maybee v. Town of Newfield, 789 F. Supp. 86, 91 (NDNY 1992) ("At most [plaintiffs] have a unilateral expectancy which does not constitute a protected property interest."). Plaintiff's claim, therefore, was correctly rejected by the Courts below.

Finally, even assuming that plaintiff, as it claims, has a property interest, its substantive due process claim must nonetheless fail. "In cases involving zoning disputes, substantive due process entitles property owners to be free from arbitrary or irrational action." *Sudarsky v. City of New York, supra*, 779 F. Supp. at 296. Applying facts and law unreviewable by this Court, the Courts below correctly determined that CPC's denial of plaintiff's application for a special permit was reasonable and not arbitrary and capricious (see, 2a-3a, 13a-20a). It follows that since plaintiff has obtained everything to which it is entitled and would thus gain nothing from a resolution of any "disharmony among the circuits" (Pet., at 22) which may exist, the issue is not appropriately addressed in this action.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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